Testimony of
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Federal Energy Regulatory Commission
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Committee on Energy and Natural Resources
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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you to discuss S. 740, the Hydroelectric Licensing Process Improvement Act of 1999, and how it might affect the Commission's hydropower program.

The Commission's hydropower program faces significant challenges today, particularly in relicensing the important projects whose licenses expire in the next 10 years. Although the Commission is required by law to license only those projects which "in the judgment of the Commission will be best adapted to a comprehensive plan for improving and developing a waterway" (Federal Power Act Section 10(a)(1)), the scope of its authority over hydropower project operations is clearly more limited than this language suggests. Other Federal and State agencies have important environmental conditioning authority. Moreover, the multiple economic, environmental, cultural, and recreational interests involved in the relicensing of most existing projects require extensive

consultation and due process. As we have seen, hydropower licensing cases can lead to contentious debates among the interested parties and even among different Federal agencies that have statutory responsibilities in the process. Chronic concerns have therefore arisen about whether licensing decisions can be more timely, and whether support for decisions can be better developed.

Fundamentally, the Commission's response has been to accelerate its consideration of licenses by promoting communication and collaboration among the parties individual cases, entering into generic agreements with other responsible agencies, and displaying a willingness to make the tough decisions when agreement cannot be achieved. First, for decisions within its discretion, the Commission takes seriously its own responsibilities to fully analyze developmental and environmental impacts, to give equal consideration to these impacts, and to exercise its balancing responsibilities in a manner that protects the environment. Second, the Commission encourages the use of its alternative licensing procedures in individual cases. This innovative approach is a tool for reaching settlements that satisfy public and private interests in a timely manner. Third, the Commission is working hard to enhance its procedures for working with the resource agencies, so the licensing process under the Federal Power Act (FPA) is as smooth and productive as possible. Legislation that will help us achieve these objectives and meet the FPA's objective of balancing all public interest considerations would be helpful.

My prepared testimony today will survey the Commission's statutory responsibilities and the overlap of regulatory agencies which are involved in the licensing process. My objective is to share with the Subcommittee an assessment about how that process has worked in practice and what we are doing to improve our productivity and our responsiveness to the needs of various participants in future cases. I will then turn to S. 740.

I. The Commission's Licensing Program

Hydropower is the oldest area of Commission jurisdiction. The Commission's predecessor began Federal regulation of private hydroelectric generation in 1920. The Commission currently regulates over 1,600 hydropower projects at over 2,000 dams pursuant to Part I of the FPA. Those projects represent more than half of the Nation's approximately 100 gigawatts of hydroelectric capacity and over 5 percent of all electric power generated in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

I am proud of the Commission's ability to meet the challenges in this area. The Commission's hydropower work generally falls into three categories of activities. First, the Commission licenses and relicenses projects. Relicensing is of particular significance because it involves projects that originally were licensed from 30 to 50 years ago. In the

intervening years, enactment of numerous environmental, land use, and other laws has begun to significantly affect the Commission's ability to control the timing of licensing and the conditions of a license. The Commission's second role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety of licensed hydropower dams. This program is widely recognized for its leadership in dam safety.

Non-federal hydropower projects have been required by the Congress to obtain Commission authorization if they are on lands or waters subject to Congress' authority. Original licenses are issued for terms of 30-50 years. Under the standards of the FPA, projects can be authorized if, in the Commission's judgment, they are "best adapted to a comprehensive plan" for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. The Congress last spoke to the Commission's role in balancing these purposes in the Electric Consumers Protection Act of 1986 (ECPA), which amended the FPA to require the Commission to give "equal consideration" to developmental and non-developmental values.

The number of applications for original licenses has steadily declined to a handful per year for a number of reasons, including the diminished availability of attractive sites

and current economic conditions. The Commission does not expect this situation to change. Most licensing activity currently before the Commission therefore involves the relicensing of existing projects.

As I stated earlier, while the Commission's overarching responsibility under the FPA is to strike an appropriate balance among the many competing power and non-power interests, as required by the public interest standards of §§ 4(e) and 10(a) of the FPA, various statutory requirements give other agencies a powerful role in licensing cases. Those requirements include:

- Section 4(e) of the FPA, which authorizes the Departments of Agriculture and the Interior to impose mandatory conditions on projects located on Federal reservations they supervise.

- Section 18 of the FPA, which authorizes the Departments of Commerce and the Interior to impose mandatory fishway prescriptions.

- Section 10(j) of the FPA, which authorizes Federal and State resource agencies to propose conditions to protect fish and wildlife.

- Section 401 of the Clean Water Act, which authorizes States to impose mandatory conditions as part of the State water quality certification process.

- The Coastal Zone Management Act, which authorizes States to impose conditions on projects affecting their coastal resources.

- The Endangered Species Act, which directs the Departments of the Interior and Commerce to propose measures to protect threatened and endangered species.

- The National Historic Preservation Act, which requires Commission consultation with Federal and State authorities to protect historic sites.

Thus, licenses typically contain requirements that are developed by a variety of agencies other than the Commission, and that often are imposed through those agencies' mandatory conditioning authority.

I recognize and respect the importance of the mandates of our sister Federal agencies, and appreciate the constraints under which they operate. However, the current regulatory structure suggests at least two things to me. First, the Commission often lacks the ability to control the timetable for license issuance. Second, the Commission often has

only very limited discretion to exercise its own judgment in determining the appropriate balance of economic efficiencies, environmental protection, and all the other public purposes the FPA identifies. These concerns have been heightened by a series of court decisions that have held that the Commission has essentially no authority to reject or modify mandatory conditions, even where, in the Commission's view, they are not consistent with statutory requirements or the public interest. See Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765 (1984) (Commission cannot reject Section 4(e) conditions); PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994) (States may include in Clean Water Act certifications conditions to protect all designated uses contained in water quality standards); American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997) (Commission cannot modify or reject State conditions under the Clean Water Act); American Rivers v. FERC, 187 F.3d 1007 (9th Cir. 1999) (Commission cannot determine if Section 18 conditions fall within the scope of that provision). The Commission's only discretion with respect to mandatory conditions it might otherwise conclude are not in the public interest is simply to deny the license application. I am sure you understand what a difficult position that puts the Commission in.

II. Meeting New Challenges

In determining whether and how to relicense a project upon expiration of its original license, the Commission must strike a balance among many legitimate but sometimes

competing interests. Development and utilization of hydropower must now adjust to an increasingly competitive electric marketplace and heightened environmental scrutiny, as well as to a decisionmaking process characterized by shared authorities. Projects coming up for relicense in the next several decades were originally licensed before the enactment of ECPA, the National Environmental Policy Act (NEPA), the Endangered Species Act, the Federal Water Pollution Control Amendments of 1972 (the Clean Water Act), and the Coastal Zone Management Act. I think it is fair to say that consideration of non-power values has come to dominate most relicensing proceedings in the modern era.

The Commission has responded to this modern era of relicensing with orders crafted to fully sustain environmental resources. For licenses issued since the passage of ECPA in 1986, for instance, the Commission has included approximately 95 percent of all fish and wildlife agency recommendations. Increased flows to provide for the needs of fish have been provided in thousands of miles of streams, boat launches and camping areas have been created for public recreation, and thousands of acres of wildlife habitat have been set aside and protected as a result of the licensing process. All of these environmental improvements have been implemented while maintaining the viability of the hydropower industry. No license issued since the Commission began relicensing the large group of projects in the so-called "class of '93" has been surrendered. Thus, licensing can achieve the balance between developmental and non-developmental values mandated by Congress.

In order to achieve optimum outcomes in hydropower licensing proceedings, the Commission has placed increased emphasis on promoting settlements and the more collaborative, alternative licensing process. The alternative process allows license applicants and other parties to collaborate on the preparation of environmental documentation and other matters early on – before an application is filed – with the goal of developing consensus on the terms and conditions of the license. Several licenses have been completed under the alternative process, and many more are currently underway. Figure 1, attached to my testimony, shows the growth in the use of the alternative licensing process, while Figure 2 shows a similar increase in the number of licenses based on settlement agreements.

The most recent example of successful use of a collaborative process is Avista Corporation's 700-MW Clark Fork Project located in Idaho and Montana. In July 1997, Avista decided to use a collaborative process for relicensing this project and formed a relicensing team consisting of Federal, State, and non-governmental organizations. The members of the relicensing team met regularly, with Commission staff providing guidance and support, to address resource concerns and ultimately develop a comprehensive settlement agreement that resulted in the protection and enhancement of the natural and human environment. A license incorporating Avista's settlement agreement was issued by the Commission in February 2000, only one year after the license application was filed.

Additional examples of successful collaborative processes include Georgia Power Company's 5.4-MW Flint River Project No. P-1218 located on the Flint River in Georgia, and International Paper Company's 23-MW Riley-Jay-Livermore Project No. P-2375 and Otis Hydroelectric Company's 10-MW Otis Hydroelectric Project No. P-8277, both located on the Androscoggin River in Maine. Licenses for each of these projects also were issued less than one year from the date the applications were filed.

I have attached to my testimony a map, Figure 3, which shows the 220 project licenses that will expire in the years 2000 through 2010. The Commission began receiving these relicense applications in 1998. They will comprise a significant “class” of projects and another spike in the Commission’s workload. This group of projects has a combined capacity of approximately 22 GW, or 20 percent of the Nation’s installed hydroelectric capacity.

In addition to supporting collaboration in individual cases, the Commission is also working hard to improve coordination among the disparate authorities involved in hydropower licensing. By way of example, for the past two years the Commission, the Department of the Interior, the Department of Commerce, the Department of Agriculture, the Department of Energy, the Council on Environmental Quality, and the Environmental Protection Agency have convened an Interagency Task Force on Improving Hydroelectric Licensing Processes to address problems in licensing. The Interagency Task Force's

agenda was created specifically to address the manner in which the Commission issues notice of license applications, how to determine which environmental studies should be performed, environmental review under the NEPA, coordination of Endangered Species Act review, guidelines for participants in the Commission's collaborative process, the crafting of clear and enforceable license conditions by State agencies and other participants, a review of the economic techniques used by various Federal agencies as they participate in the licensing process, and input to the reform of the Commission's ex parte rules.

At the Task Force's request, Secretary Babbitt and I chartered an advisory committee, pursuant to the Federal Advisory Committee Act, to obtain input from States, licensees, Indian Tribes, counties, and non-governmental organizations. I expect that the Task Force will continue to generate important work products and, perhaps just as important, foster a spirit of collaboration among the agencies involved, with the goal of making the licensing process as efficient as possible within the existing statutory framework.

From the Commission's viewpoint, the Task Force has led to some encouraging developments. For instance, the resource agencies have indicated that they are exploring concrete reforms to enhance their participation in the licensing process, including procedures for obtaining public review and input on proposed license conditions, such as notice and comment procedures and making a commitment to participate in cases where the

collaborative process is used, subject to their own resource constraints at the time. I support these reforms and have reason to believe they will be implemented. I would nevertheless emphasize that my expectations for the Task Force are high. All of the participating agencies must resolve to discharge their responsibilities more efficiently.

III. Comments on S. 740

My comments above relate to the Commission's diligence in making the current statutory framework, as interpreted by the courts, work as effectively as possible. Now let me turn to comments on proposals to change Federal statutes. I will discuss S. 740.

S. 740 would amend the FPA with the respect to mandatory license conditions submitted by the Secretaries of the Interior and Commerce under Sections 4(e) and 18 of that Act, and by Federal agencies supervising lands on which project works are located. The bill would require them to take into consideration various factors, including the impacts of proposed conditions on economic and power values, electric generation capacity and system reliability, air quality, drinking water, flood control, irrigation, navigation, or recreation water supply, compatibility with other license conditions, and means to insure that conditions address only direct project environmental impacts at the lowest project cost. The Departments would be required to provide written documentation for their

conditions, submit them to scientific review, and provide administrative review of proposed conditions.

S. 740 would provide for the Commission to establish a deadline for the submittal of mandatory conditions in each case, to be no later than one year after the Commission issues notice that a license application is ready for environmental review. If an agency fails to submit a final condition by the deadline, the agency loses the authority to recommend or establish license conditions. The Commission must conduct an economic analysis of conditions proposed by consulting agencies, and, upon request of license applicants, must make a written determination whether such conditions are in the public interest, were subjected to scientific review, relate to direct project impacts, are reasonable and supported by substantial evidence, and are consistent with the FPA and other license conditions.

In addition, the bill provides that the Commission shall be the lead agency for environmental review under the NEPA, and that other Federal agencies will not perform additional environmental review.

Finally, the bill provides that the Commission shall submit to Congress a study of the feasibility of establishing a separate licensing procedure for "small hydroelectric

projects," which term the Commission may define by regulation, but which must at a minimum include projects with generating capacities of five megawatts or less.

I support the underlying purpose of the bill, which is to promote sensible and timely decisions by all agencies involved in licensing matters. Reasoned decision-making with respect to mandatory conditions must be the responsibility of the resource agencies, given the Commission's very limited discretion with respect to such conditions. As Congress considers any legislation, however, it should be careful to ensure that any procedures that could add time or expense to the process are justified by improved outcomes.

Several portions of S. 740 could improve the process. For instance, having the resource agencies consider economic as well as environmental impacts would lead to better-informed determinations on what mandatory conditions are in the public interest. The Commission is required to take into account a range of public interest factors for matters within its discretion. The requirement for resource agencies to document their decision making is essential for due process. See Bangor Hydroelectric Co. v. FERC, 78 F.3d 659 (D.C. Cir. 1996). Establishing reasonable deadlines for submission of conditions (as the Commission's regulations now provide) could help make the licensing process more timely. These sensible requirements should make licensing more timely and efficient, while supporting well-reasoned licensing decisions.

I am much less confident about the effectiveness and practicality of some other procedures that would be established by the bill, such as those requiring scientific peer review of conditions, mandating detailed administrative review procedures, and requiring the Commission to review the economic impact of mandatory conditions and to opine on whether the resource agencies have complied with the bill's requirements. My primary concern is that, individually and especially in the aggregate, such processes will add burdensome, time-consuming steps to the licensing process, increasing its costliness and further delaying Commission action. To add to the burden placed on licensees and other participants, without a compensating benefit, would contradict the purposes of the bill. I am also concerned about the portion of the bill that would permit only the Commission to conduct NEPA environmental analyses. This might prevent individual agencies from performing the review that they need to support their portion of the licensing process in a timely fashion. Further, the Commission would be required to do NEPA analysis on the resource agencies' behalf, which would not only increase the Commission's workload but could lead to disputes as to whether the Commission's efforts are sufficient for the resource agencies' purposes.

With respect to the idea of a separate licensing procedure for small hydroelectric projects, as a general matter, I do not support differing regulation based on the size of hydroelectric projects. A project with a small capacity can have a significant impact both at the project site and beyond its immediate environs. Pursuant to the mandates of the

Federal Power Act, the Commission evaluates that impact, and, in rendering a licensing decision, gives equal consideration to development interests and environmental resources in determining whether, and with what requirements, to authorize hydropower development. The Commission's current licensing "exemption" program for projects 5-MW or less, pursuant to Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, has demonstrated the difficulty of establishing diminished requirements for this group of projects. Of course, we are prepared to study this matter and report back to Congress.

CONCLUSION

In conclusion, I want to thank you for this opportunity to speak to you today about the hydropower program. The Commission stands ready to work with Congress and with all interested parties to make the hydroelectric licensing process as efficient as possible, while ensuring that we continue to balance all of the interests that surround this important national resource. I will be pleased to answer any questions you may have.